Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-834

MORTON FUNGER, et al.,

Petitioners,

vs.

MONTGOMERY COUNTY, MARYLAND, et al.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS, CITIZENS COORDINATING COMMITTEE ON FRIENDSHIP HEIGHTS, INC., ET AL.

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Respondents, Citizens Coordinating Committee on Friendship Heights, Inc., Herbert J. O'Connor, James Patterson, Marshall Lasky and Mary Lasky, respectfully submit that this Court should not issue a Writ of Certiorari as prayed in the Petition filed herein.

OPINIONS BELOW

The opinions below are described accurately in the Petition, and are appended thereto as Appendices A and B. The opinion of the Court of Appeals of Maryland in Montgomery County, Maryland, et al. vs. Woodward and Lothrop, Inc., et al., previously published unofficially at 376 A.2d 483, is now officially reported at 280 Md. 686 (1977).

JURISDICTION

The date and time of entry of the judgment sought to be reviewed and the date and terms of the order granting an extension of time within which to petition for certiorari appear to have been set forth accurately in the Petition. Jurisdiction of this Court has been invoked under 28 U.S.C. Section 1257, but the subsection thereof has not been specified. It would appear that jurisdiction, if appropriate, would only lie under subsection (3) thereof.

QUESTION PRESENTED

When a legislative body enacts a broad and general comprehensive zoning measure for a wide area which includes an entire political subdivision, does the Due Process Clause of the Fourteenth Amendment require that time limitations be removed and unlimited cross-examination be allowed when demanded by an affected property owner alleging* depreciation of the value of his land?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Certain provisions of the United States Constitution and of the Montgomery County Code (1972) are accurately set

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* The claim of reduction in value is attacked as being without merit, infra, at Page 16.

forth at Page 3 of the Petition and in Appendix C thereof. Also involved are the provisions of Sections 59-195, 59-199, and 59-200 of the Montgomery County Code (1972), which are set forth in Appendix A hereto.

STATEMENT OF THE CASE

These Respondents will not here attempt to catalogue all of the errors made by the Petitioners in their characterization of the legislative and judicial proceedings which have preceded the filing of their Petition. Suffice it to say that (1) the actions taken by the County Council for Montgomery County were carefully considered, broad-based legislative acts that did not constitute a "reversal" of the planning history of the already heavily developed Friendship Heights area; (2) the action taken with respect to the property of the Petitioners cannot, in any event, be fairly characterized as "downzoning"; and (3) the Petitioners were afforded an ample and adequate opportunity to participate in the proceedings leading to the decision ultimately reached.

Friendship Heights is a single area lying in both Montgomery County, Maryland, and the District of Columbia in the vicinity of Western Avenue (the boundary) and Wisconsin Avenue. The Maryland portion has a present population of approximately 6,000 persons and contains an entire political subdivision, Friendship Heights and the Hills. The nature of the

area was described by the Court of Appeals of Maryland in the following terms:

> "The Friendship Heights CBD (Central Business District) is compact and intensely developed; within its borders is a mixture of residential, office, and commercial development consisting of a number of high-rise, high-density apartment houses and hotels, office buildings, retail shopping centers, including several department stores, and some single family residences. It has been aptly described as an urban cross-road, a business center both local and regional in scope, with buildings of 'Manhattanlike' proportions. It is a major transportation center in the County and a rapid rail (Metro) transit station is scheduled for construction at the intersection of Wisconsin and Western Avenues by late 1980." (Appendix A to Petition, Page 6a.)

In the decade leading up to the action challenged in the instant case, various planning documents applicable to Friendship Heights warned of the inadequacy of existing zones for central business districts and urged that a detailed plan be prepared for the area in cooperation with District of Columbia authori-

ties. The recommendations of these studies culminated in the enactment of new central business district zones for use throughout Montgomery County and adoption of a "Sector Plan" for Friendship Heights. The Sector Plan constituted a detailed amendment to the local master plan and recommended the boundaries of the zoning districts that should be employed in Friendship Heights using the new central business district zones. The recommendations for the zoning districts were the product of careful study of the severe environmental constraints on the Friendship Heights area, including inadequacy of existing and proposed streets and sewers and air pollution hazards.

The Sector Plan (and the challenged zoning actions based on it) was not, as urged by Petitioners, a reversal of "most zoning and planning decisions of the previous decade for the Friendship Heights area." (Petition, Page 4) Indeed, it is rather surprising that such a suggestion is made since it was rejected by the Court of Appeals of Maryland and is not here for review. As was said in its opinion, the "Sector Plan, upon which the sectional map amendment was based, plainly constitutes the detailed development plan for the Friendship Heights CBD called for in the Bethesda-Chevy Chase Master Plan, the need for which was also recognized in the General Plan.* * *Moreover contrary to appellees' (Petitioners') suggestion, the Adopted Sector Plan is by no means fundamentally inconsistent with either the General Plan or the B-CC Master Plan; it represented but a specific

modification of the planning and zoning objectives broadly outlined in those documents based on existing land use facts." (Appendix A to Petition, Pages 29a, 30a.)

The process of implementation of the new zones and creation of the new zoning district boundaries recommended in the Sector Plan was initiated by the County Council's* filing of a "sectional map amendment" application, a comprehensive zoning process through which wide-spread zoning actions are accomplished, as opposed to individual parcel or piecemeal rezonings which are known under applicable ordinances as "local map amendments".**

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* The County Council is the general legislative body for Montgomery County, a charter county existing under the provisions of Article XI-A of the Maryland Constitution. A general grant of powers is given to all charter counties in Article 25A of the Annotated Code of Maryland, and specific zoning authority is granted to the County Council for Montgomery County in Article 66D of the Annotated Code of Maryland.

** The contrast between the comprehensive and piecemeal rezoning processes can be seen from an examination of Sections 59-195, 59-199 and 59-200 of the Montgomery County Code (1972), the provisions of which are set forth in Appendix A to this brief.

Consistent with the requirements of local law, a public hearing was held by the County Council on the comprehensive rezoning proceedings initiated by it. All major property owners (including Petitioners) were advised prior to the hearing that in light of the intense interest expressed in the proceedings, cross-examination of witnesses could not be allowed and that time limitations would be imposed on all speakers.

Although such limitations were imposed, the greatest time was allotted to property owners (8 minutes), unlimited pooling of testimony was allowed, provision was made for the submission of unlimited written materials, the Council announced that it would, and in fact did, continue the hearing until all interested persons had been heard and given the opportunity to present unlimited quantities of written materials, and time was afforded to any interested person to give rebuttal testimony without any time limitations. The last mentioned privilege was not exercised by the Petitioners. The Council also incorporated by reference the massive record of the proceedings previously conducted on the Sector Plan in which the Petitioners actively participated.

Petitioners demanded and were refused relaxation of the time restrictions and the limitation on cross-examination. In denying the request, the County Council President noted that it "would in fact be quite impractical to permit all land-owners and all other parties inter-

ested in this zoning amendment to cross-examine each of the other witnesses. Full freedom in this respect would probably occupy the remaining weeks of the summer and perhaps the fall."

Notwithstanding the foregoing limitations, a gigantic record was produced before the County Council, and just the portions thereof printed for consideration by the Court of Appeals of Maryland consumed 12 volumes and 4,995 pages. Four hundred pages, or an entire volume, were generated by the attorneys for the Petitioners.

As they do here, Petitioners argued before the County Council that approval of the proposed comprehensive zoning change would "downzone" a portion of their property. (Petition, Page 4) Prior to the zoning changes, the entire 18.19 acre tract owned by the Petitioners was zoned R-H, a zone under which "high-rise" development of 792 dwelling units would have been permissible. Following the rezoning proceedings, over 14½ acres remained in the R-H zone, while a small area of 3.5 acres was placed in the R-60 zone, a zone under which single-family homes on lots of 6,000 square feet may be constructed.

Specific reference to this action was made in the Sector Plan upon which the comprehensive rezoning was based where it was noted that in the event of R-H development, the portion of the tract zoned R-60 would provide a tapering of development in that area which is close to existing, similar development; the Sector Plan went on,

moreover, to make the "strong recommendation" that the property be developed in its entirety under the provisions of the PD-44 "floating" (non-Euclidean) zone under which development of up to 800 dwelling units could take place. Pointing to this provision of the Sector Plan, the Court of Appeals of Maryland rejected the claim of Petitioners that the rezoning had reduced allowable density of development (and thus depreciated its value) by noting that the property "could be developed PD-44, as recommended by the Adopted Sector Plan, at a density higher than was permitted by the R-H zoning in effect prior to adoption of the sectional map amendment." (Emphasis supplied.) (Appendix A to Petition, Page 68a.)

Following the hearing, the comprehensive rezoning was enacted by the County Council, and appeals taken by the Petitioners and others to the Circuit Court for Montgomery County. Appeals from the adverse decision of the Circuit Court were taken to the Court of Special Appeals of Maryland, and the Court of Appeals of Maryland granted certiorari to consider the case prior to any action by the Court of Special Appeals.

In a unanimous decision by its Chief Judge, the Court of Appeals of Maryland rejected the contention of the Petitioners that they should have been afforded trial-type rights in the comprehensive rezoning of Friendship Heights. In its opinion, the Court stated:

> "The Appellants (Respondents) contend, and we agree, that in comprehensive rezoning proceed-

ings the Council does not consider and determine adjudicative facts concerning particular parties within the contemplation of our decision in Hyson (vs. Montgomery County Council, 242 Md. 55, 217 A.2d 578 (1966)). A real distinction exists between piecemeal and comprehensive rezoning hearings; it lies in the nature of the basic function being performed by the zoning authority in each case. In a local map amendment proceeding in Montgomery County, the zoning authority considers a single piece of property and must make a factual determination, based on evidence of record, as to whether there has been a change in the physical character of the neighborhood where the property is located or a mistake was made in the original zoning. Piecemeal rezoning hearings, therefore, contemplate an adversary or trial-type procedure to resolve adjudicative facts. A different determinative standard applies where the Council is considering a comprehensive rezoning by the sectional map amendment process; there its focus is not on a single piece of property, but rather on a considerable number of properties as they relate to each other and to the surrounding area. The Council in that instance considers whether the comprehensive rezoning takes into ac-

> count future public needs and purposes; whether it is designed to provide an adequate potential for orderly growth in the future and to satisfy local and regional needs; and ultimately whether it bears the requisite relationship to the public health, safety and general welfare. * * * The procedure is fundamentally legislative and no significant quasi-judicial function is involved." (Appendix A to Petition, Pages 46a-47a.)

The decision of the Circuit Court for Montgomery County was thus reversed and the case remanded for the entry of an order affirming the action of the County Council. The Petition in the instant case followed.

ARGUMENT

These Respondents respectfully submit that the Petition should not be granted since there are neither special nor important reasons for review on writ of certiorari. The federal question resolved by the Court of Appeals of Maryland is not substantial, and has been resolved previously in applicable decisions of this Court in a manner consistent with the disposition made below. Furthermore, even if a federal question of substance is presented, the Petitioners do not appear to be appropriate parties to seek a resolution of that issue in this Court.

I.
THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT AND THE DECISION BELOW IS IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

These Respondents have elected to restate the question presented since the manner in which it is posed by the Petitioners fails to take into consideration the status of the decision making body or the nature of the decision reached. Instead, Petitioners seek to have trial-type protections triggered solely by the claim that monetary loss will result from any form of governmental decision making. Such is not, nor has it ever been, the law, and the in vacuo manner in which the question is presented cannot provide the Petitioners with a successful escape route from adverse decisions of this Court.

The decision made in the instant case was not that of an administrative body exercising limited powers with respect to requests for finite zoning decisions relating to a specific piece of property. Rather, it was a legislative enactment of a legislative body possessing a general grant of the police power. The decision was not made with respect to an individual property, but rather was broad-based and affected a wide area. If, as Petitioners contend, decisions of this type could only be made after affording trial-type rights to parties claiming to be affected, general governmental decision-making would grind to a screeching halt.

This much was observed by this Court over 60 years ago in Bi-Metallic Investment Co. vs. State Board of Equalization of Colorado, 239 U. S. 441, 445, 36 S. Ct. 141, 60 L. Ed. 372 (1915), where Mr. Justice Holmes stated:

> "Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meetings or in assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.* * * There must be a limit to individ-

ual argument in such matters if government is to go on." (Emphasis supplied.)

However, "individual argument" was allowed in the instant case to an extent sufficient to allow the attorneys for the Petitioners to generate over 400 pages of record materials. No limitation was placed upon the submission of written materials, and rebuttal testimony was allowed without limitation -- a right not exercised by the Petitioners.

Seeking to avoid the effect of, but not discussing, Bi-Metallic, supra, Petitioners place primary reliance upon footnote 13 in the majority opinion and the substance of the dissenting opinions in this Court's recent decision in City of Eastlake vs. Forest City Enterprises, 426 U. S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976). Their reliance, however, is sadly misplaced. Eastlake did not involve the adoption of zoning restrictions applicable to a substantial or wide area involving many properties, but rather concerned the application of an individual property owner for a financially beneficial change in the zoning of its property. Petitioners, however, erroneously attempt to gloss over the individual nature of the decision there made and place sole emphasis upon this Court's passing reference to the absence of any adverse monetary impact of the decision. They then point to comments made by Mr. Justice Stevens in his dissenting opinion concerning the claimed unfairness of the procedure in that case.

In citing the opinion of Mr. Justice Stevens, however, the Petitioners fail to

point out that the cases relied upon by him concerning procedural rights of parties in zoning proceedings related solely to individual properties. Indeed, the distinction between individual and comprehensive zoning proceedings is stressed in the quotations contained in his dissenting opinion from recent, leading state cases on the subject.

For example, in Fasano vs. Board of County Commissioners, 264 Ore. 574, 580-581, 507 P. 2d 23, 26 (1973), quoted at 426 U. S. 684, the Supreme Court of Oregon noted that "(o)rdinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon Constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test." (Emphasis supplied.) To the same effect is Fleming vs. City of Tacoma, 81 Wash. 2d 292, 298-299, 502 P. 2d 327, 331 (1972), quoted at 426 U. S. 684-5.

Clearly, then, the procedures employed in the instant case were consistent with the views of both the majority and the dissenters in Eastlake. Nor is anything in the decisions relied upon by Mr. Justice Stevens in his dissent or in the majority opinion supportive of the proposition that monetary consequences

alone should trigger the existence of trial-type due process rights.

The same distinction between piecemeal and comprehensive zoning proceedings as was made below and in Fasano and Fleming was embraced and then abandoned, by the United States Court of Appeals for the Fifth Circuit in South Gwinnett Venture vs. Pruitt, 482 F. 2d 389, rehearing granted 487 F. 2d 1333, certiorari dismissed, 416 U. S. 901, 94 S. Ct. 1625, 40 L. Ed. 2d 119, en banc decision 491 F. 2d 5 (5th Cir., 1973), certiorari denied, 419 U. S. 837, 95 S. Ct. 66, 42 L. Ed. 2d 64 (1974). There, trial-type rights were denied even in piecemeal proceedings. And, in San Diego Building Contractors Association vs. City Council of the City of San Diego, 13 Cal. 3d 205, 118 Cal. Rptr. 146, 529 P. 2d 570, appeal dismissed, 427 U. S. 901, 96 S. Ct. 3184, 49 L. Ed. 2d 1195 (1976), the Supreme Court of California, citing Bi-Metallic, supra, rejected an attack upon the adoption of a broad and general zoning ordinance by initiative where no hearing had been held, stressing the same differences in the nature of the decision as have been discussed above. The decision below is consistent with Bi-Metallic, South Gwinnett and San Diego Building Contractors. As with the latter two cases, review should also here be denied.

II.
THE PETITIONERS ARE NOT PROPER PARTIES TO RAISE THE QUESTION PRESENTED.

The Petition in the instant case is laced with references to the action of the County Council as a "downzoning". Although it might be arguable that this theme could be sounded by other Friendship Heights property owners, it is clear that Petitioners are not in a position to argue that the comprehensive rezoning of Friendship Heights denigrated the use or depreciated the value of their land.

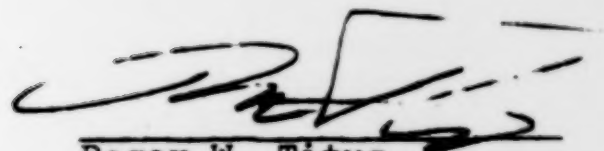
As has been noted above in the statement of the case, the Friendship Heights comprehensive rezoning left undisturbed the prior zoning of over 80% of the property of the Petitioners. Furthermore, as was pointed out by the Court of Appeals of Maryland, development of the Petitioner's property in accordance with the PD-44 development recommended by the Adopted Sector Plan would result in a density higher than was permitted by the R-H zoning in effect prior to adoption of the sectional map amendment.

Clearly, then, the Petitioners have suffered neither a denigration of use nor a depreciation of the value of their land. Hence, it would be inappropriate and improvident for this Court to grant review on writ of certiorari to the Petitioners who are before it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the Court of Appeals of Maryland should be denied.

Respectfully submitted,



Roger W. Titus,
Attorney for Respondents, Citizens Coordinating Committee on Friendship Heights, Inc., et al.

APPENDIX A

Sec. 59-195. Map amendments—Classification.

Application for amendment of the zoning map may be in the form of:

(a) A local amendment covering a single tract, all portions of which are proposed to be classified in the same zone; or all portions of which are proposed to be classified in one of two alternative zones.

(b) A sectional plan amendment covering a section of the Maryland-Washington Regional District, portions of which may be proposed to be classified in different zones.

(c) A district plan amendment covering the entire Maryland-Washington Regional District within the county.

Sec. 59-199. Same—Contents—Local map amendments.

In case of a local map amendment under section 59-195, the application therefor shall be in such form as the district council may prescribe and shall include the following:

(a) A written statement specifying the following:

(1) The election district and municipality or community in which is located the land proposed to be reclassified, and the street number, if any, or if none the location with respect to nearby public roads in common use.

(2) A description by metes and bounds, courses and distances of the land, or if the boundaries conform to lot boundaries within a subdivision for which a plat is recorded in the land records of the county then the lot, block and subdivision designations with appropriate plat reference.

(3) The present zoning classification of the land, the proposed classification and the alternative classification, if any.

(4) The name and address of the owner of the land.

(5) The area of the land proposed to be reclassified, stated in square feet if less than one acre and in acres if one acre or more.

(6) The application number and the date of application of, and action taken on, all prior applications filed within three years previously for the reclassification of the whole or any part of the land proposed to be reclassified.

(b) An identification plat prepared by a civil engineer, surveyor or other competent person, and certified thereon by him to be correct and in conformity with this subsection, showing by metes

and bounds, courses and distances the land proposed to be reclassified, or if the boundaries conform to lot boundaries within a subdivision for which a plat is recorded among the land records of the county, then a copy of such plat, the land proposed to be reclassified appearing in a color distinctive from that of other land shown on the plat.

(c) A vicinity map shall be furnished by the commission, covering the area within at least one thousand feet of the boundaries of the land proposed to be reclassified to the extent that such area lies within the county or Prince George's County or the District of Columbia, showing the existing classification of all land appearing on the map as shown on the official zoning map on file in the office of the department or the office of the commission and all roads, streets, alleys, parks and other public or governmental areas in public ownership or on public rights of way or proposed on a plan adopted by the commission, and all streams and railroad rights of way within the area covered by the map, and the names thereof.

(d) If the land proposed to be reclassified lies in whole or in part within an area covered by a sectional highway or zoning plan map adopted by the commission, then a copy of such map shall be furnished by the commission.

(e) On the plat and maps required under the above paragraphs, the land proposed to be reclassified shall appear in a color distinctive from that of other land shown thereon. The scale of the plat and map required by the above paragraphs shall be noted thereon and shall be not less than two hundred feet to the inch if the land proposed to be reclassified is of an area of ten acres or less; and not less than four hundred feet to the inch if of an area of more than ten acres. A north direction arrow shall appear on such plat and maps.

(f) Such other relevant information as either the district council or the hearing examiner determines to be necessary to evaluate the impact of a particular application on public facilities, or existing or proposed development in the immediate area of the application.

Sec. 59-200. Same—Same—Sectional and district plan map amendments.

In case of a district zoning plan amendment, the application therefor shall be in such form as is required by law. In the case of a sectional zoning amendment, the application shall include:

(a) The designation or description of the area sufficient to identify the same.

(1) The boundaries of each area proposed for the same classification either by lot, block or subdivision designation with appropriate plat reference where a plat for the subdivision is recorded in the land records of the county, or by streets, roads, streams or other topographic landmarks, or by metes and bounds, courses and distances, as may be most appropriate, together with indications where such classification, if adopted, would result in changes of classification, the nature of the changes and the boundaries of the land covered by such changes.

(2) All roads, streets, alleys, parks, governmental or other public areas in public ownership or on public rights of way or proposed therefor on a plan adopted by the commission, and all streams and railroad rights of way within the area required to be covered by the map, and the names thereof.

(b) A map or maps of the area prepared by a civil engineer, surveyor or other competent person and certified by him to be correct and in conformity with this subsection showing, if the area lies in whole or in part within an area covered by a sectional highway plan map adopted by the commission, a copy of such map. The scale of the maps required under this subsection shall be noted thereon and shall be an appropriate scale not less than four hundred feet to the inch. A north direction arrow shall appear on such map.